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No. 400

In the Supreme Court of the United States

OCTOBER TERM, 1930

MASCOT OIL COMPANY, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition in this case.

OPINION BELOW

The opinion of the Court of Claims (R. 13) is reported in 42 F. (2d) 309.

JURISDICTION

The judgment sought to be reviewed was entered on June 2, 1930. (R. 16.) The petition for certiorari was filed on August 27, 1930. (R. 16.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the petitioner is deprived of the right it would otherwise have had to recover taxes col-

lected after the statutory period of limitations had expired, because after the statutory period for collection of a tax for 1918 had expired it made a deposit of cash in escrow as a guaranty of payment of the tax as finally determined.

2. Whether Sections 611 and 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, operate to deprive it of this right.

3. Whether a waiver executed on October 11, 1925, justified the collection.

STATUTES INVOLVED

Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113 (U. S. C. App., Title 26, sec. 1249), provides:

> SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Sections 611 and 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, provide:

> SEC. 611. *Collections Stayed by Claim in Abatement.*—If any internal-revenue tax

(or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. [U. S. C., Supp. III, Title 26, sec. 2611.]

SEC. 612. *Repeal of Section 1106 (a) of 1926 Act.*—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. [U. S. C., Supp. III, Title 26, sec. 2612.]

STATEMENT

In August, 1919, the petitioner filed its income and profits tax return for the year 1918. (R. 11.) In December, 1919, the petitioner filed a claim in abatement for the year 1918. (R. 11.) In July, 1920, the Commissioner of Internal Revenue assessed an additional tax against the petitioner. (R. 11.) In August, 1920, a second claim in abatement was filed by the petitioner covering the years 1917 and 1918. (R. 11.) In August, 1924, the five-year period for assessment for collection of the 1918 tax expired. On September 18, 1925, the petitioner deposited in a bank in escrow a sum of

money to insure payment of the tax finally determined to be due for the years 1917 and 1918. (R. 11.) On October 10, 1925, the depositary wrote the Collector of Internal Revenue that it was authorized by the petitioner to pay the Collector up to $65,000 upon his final determination of the petitioner's tax for 1917 and 1918 and that such payment would be made upon the Collector's demand. (R. 12.) On June 8, 1926, the petitioner, upon demand, paid the tax of 1918; and the Collector withdrew all claim to the deposit. (R. 12.) On October 28, 1928, the petitioner filed a claim for refund for the amount of additional tax paid for the year 1918 on the ground that the taxes were collected after the expiration of the period of limitation. (R. 13.) This claim was rejected by the Commissioner (R. 13), and this suit was brought by the petitioner in the Court of Claims on February 27, 1929. That court dismissed the petition.

The Government urged in the court below that the collection on June 8, 1926, was justified, not only because of the escrow agreement but also because of a waiver as to the collection of the tax, executed on October 11, 1925. The only statement in regard to this waiver in the Findings of the Court of Claims is the following, under paragraph 5 (R. 12):

> On the day following that on which the deposit was made in the bank, as hereinabove recited, the plaintiff and the commis-

> sioner signed an income and profits tax waiver, whereby the taxpayer waived "any period of limitation as to the time within which distraint or a proceeding in court may be begun for the collection of the tax," as provided in section 278 (d) of the existing revenue act for the years 1917 and 1918, the same to remain in effect until December 31, 1926.

That court did not decide what effect this waiver had. The Government does not at this time intend to remove this question from the case.

DISCUSSION

The Court of Claims held on the authority of *United States* v. *John Barth Co.*, 279 U. S. 370, that the collection was by virtue of the deposit of guaranty and not by reason of the tax liability, and that therefore there could be no recovery. Since this decision is apparently in conflict with that of the Circuit Court of Appeals for the Third Circuit in *Heiner* v. *Erie Coal & Coke Co.*, 42 F. (2d) 214, in which the Government is petitioning for a writ of certiorari on behalf of the Collector (No. 508), we do not oppose the issuance of the writ in this case. In the *Erie Coal & Coke case* the taxpayer executed a bond guaranteeing the payment of the tax, but the court nevertheless entered a judgment allowing the taxpayer to recover the payment which it had made.

If the decision of the Court of Claims on this point is not sound, the case raises the same point

involving the effect of Section 1106 (a) of the Revenue Act of 1926 as is presented in the case of *United States* v. *Wyman, Partridge & Co.*, No. 416, October Term, 1930, now pending on petition for certiorari to the Court of Claims. In that case, as in the instant case, the payment was made after the passage of the Revenue Act of 1926. The related question of the effect of Section 611 of the Revenue Act of 1928 is already before the Court in the following cases where the collection was made before the enactment of the Revenue Act of 1926: *Graham and Foster, Co-partners, etc.*, v. *Goodcell, Collector*, No. 36, October Term, 1930, certiorari granted, March 3, 1930; *Magee* v. *United States*, No. 65, October Term, 1930, certiorari granted, May 19, 1930; *Oak Worsted Mills* v. *United States*, No. 104, October Term, 1930, certiorari granted, June 2, 1930; and *Taft Woolen Company* v. *United States*, No. 105, October Term, 1930, certiorari granted, June 2, 1930; and several other cases now pending on taxpayers' petitions for certiorari which the Government has not opposed. The facts in the instant case are similar to those in the above cases. In three of them suit was brought before the passage of the Act of 1928, but the instant case and the *Magee case* were brought after its passage.

CONCLUSION

In view of the fact that this case involves questions which are involved in other cases now before

the Court, the United States does not oppose the granting of the writ.

Respectfully submitted.

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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 13) is reported in 42 F. (2d) 309.

JURISDICTION

The judgment of the Court of Claims was entered June 2, 1930. (R. 16.) The petition for certiorari was filed August 27, 1930 (R. 16), and certiorari was granted October 27, 1930. (R. 17.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the petitioner is deprived of the right it would otherwise have had to recover taxes collected after the statutory period of limitations had expired, because after the statutory period for collection of a tax for 1918 had expired it made a deposit of cash in escrow as a guaranty of payment of the tax as finally determined.

2. Whether Sections 611 and 612 of the Revenue Act of 1928 operate to deprive it of this right.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 9–11.

STATEMENT

In August, 1919, the petitioner filed its income and excess-profits tax return for the year 1918 and the amount of the tax shown thereon was timely assessed. (R. 11.) This amount, with the exception of $14,204.41, was paid during 1919, and in December, 1919, a claim in abatement of the unpaid assessment was filed. (R. 11.)

In July, 1920, the Commissioner assessed an additional amount of $38,030.51. (R. 11.) In August, 1920, the taxpayer filed a claim in abatement of this assessment. (R. 11.) On September 18, 1925, after the period for collection had expired (August, 1924), the taxpayer deposited $65,000 with a bank to insure payment of the amount finally determined to be due for the year 1918 and for another year. (R. 11.) The bank notified the

Collector of the deposit and of the bank's authorization to pay to the Collector the amount finally determined to be due and of its willingness to so pay. (R. 12.) On September 19, 1925, the taxpayer filed a waiver of the limitation period against collection as provided in the Revenue Act of 1924. (R. 12.) On March 29, 1926, a further waiver of certain provisions of the Revenue Act of 1926 was filed. On April 28, 1926, the Commissioner abated the 1918 additional assessment in part and determined the correct amount of the assessment. (R. 11, 12.)

On May 28, 1926, the Collector made demand of the petitioner for payment of $28,846.64, the amount then unpaid, and on June 8, 1926, this amount was paid by the petitioner under protest. Thereupon the Collector withdrew all claim upon the deposit which had been made to guarantee payment of the tax. (R. 12.) Claim for refund was filed October 28, 1928, and rejected. (R. 13.) Suit was instituted February 27, 1929. (R. 7.) The Court of Claims dismissed the petition. (R. 16.)

ARGUMENT

In its opinion, the Court of Claims considered merely the effect of the deposit made by the petitioner in escrow. Brief reference was also made to a waiver executed on the day after the deposit was made, whereby the taxpayer, as the findings recite (R. 12)—

> waived "any period of limitation as to the time within which distraint or a proceed-

ing in court may be begun for the collection of the tax," as provided in section 278 (d) of the existing revenue act.

We do not rely upon this waiver because it appears to have been directed solely to the period of limitation provided by the Revenue Act of 1924. Under the decision of this Court in *Russell* v. *United States,* 278 U. S. 181, such period is not applicable to the collection of taxes assessed prior to June 2, 1924. Apparently the waiver was not broad enough to apply to the five-year limitation (prescribed by the Revenue Act of 1921) which had already expired.

An examination of another waiver referred to by the court below in Finding V (R. 12) indicates that it was a waiver authorized by Section 274 (d) of the Revenue Act of 1926 of the prohibition against the Commissioner's collecting within the sixty-day period provided by Section 274 (a) of that act. Therefore, we do not urge that this should be construed to apply to the five-year limitation which had already expired.

I

THE DEPOSIT OF $65,000 IN ESCROW AND THE ACCOMPANYING AGREEMENT TO PAY THE AMOUNT OF THE TAX LIABILITY PRECLUDE RECOVERY BY THE PETITIONER

The Court of Claims decided in favor of the Government on the ground that there had been substituted for the tax liability a contract to pay a certain amount when it was determined by the

Commissioner, and that an action on that contract was not barred by the statute of limitations applicable to collection of taxes. The case of *United States* v. *John Barth Co.*, 279 U. S. 370, was cited in support of the decision.

A similar question is presented in the case of *D. B. Heiner, Collector*, v. *Erie Coke & Coal Company*, now pending here on certiorari, No. 508, October Term, 1930, and assigned for argument before this case. Under Point I of its brief in that case, the Government has discussed the validity and effect of a bond given by a taxpayer under circumstances similar to those in the instant case. The present discussion, therefore, will be confined to a consideration of the distinctions between this case and the *Erie case*.

Here, as in the *Erie case*, assessment was made in time, and payment was out of time. In the *Erie case* a claim in abatement was filed after the statute of limitations had run, while here the claim in abatement was filed prior to the expiration of the statutory period for collection. In both cases, the taxpayer, after the running of the statute, entered into an agreement with the Collector to pay the amount of taxes finally determined to be due; but in the *Erie case* the agreement took the form of a surety bond, while here it was a deposit in escrow with an agreement by the bank for itself and on behalf of the taxpayer to pay. In both cases, the Collector collected from the taxpayer instead of